EQUITICORP HOLDINGS LTD

v.

UNITED SECURITIES SDN BHD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
JAMES FOONG JCA
SURIYADI HALIM OMAR JCA
[CIVIL APPEAL NO: W-02-410-2007]
17 AUGUST 2007

COMPANY LAW: *Winding up - Stay of proceedings - Appeal against - Locus standi - Special circumstances - Exercise of court's discretion - Whether order for stay warranted*

The High Court made an order winding up the respondent company on a petition presented by the appellant petitioner. The respondent gave notice of appeal to this court; that appeal ('merits appeal') was pending. In the meantime, the respondent took out a summons returnable before the judge in chambers seeking a stay of the winding up order. The summons said that the application was made under s. 243(1) of the Companies Act 1965 ('Act') and/or the inherent jurisdiction. The judge who heard the summons made an order staying the effects of the winding up order until the outcome of the merits appeal. The appellant appealed against that order, submitting: (i) that the respondent lacked standing to apply for a stay; and (ii) that the facts before the High Court did not warrant an order for stay under s. 243(1) of the Act.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The appellant's argument that the respondent lacked standing must be rejected both on principle and authority. As for principle, the point was simply this. If the appellant were correct in its argument, then no appeal can ever be lodged by a company against which a winding up order is made, because there would be nobody competent to mount the challenge. The company having been wound up ceases to be able to act save through the liquidator. If he decides not to appeal then that is the end of that and nothing further can be done. A

A similar submission was made in *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* and rejected by the Supreme Court. There was, therefore, nothing in the *locus standi* point. (paras 2 & 3)

B **(2)** It was clear from the order made by the learned judge that he granted a stay pending the disposal of the merits appeal, which is not the kind of order a court makes under s. 243(1) of the Act. So, it was obviously uppermost in the mind of the learned judge, experienced in company law, that it was not C open for him to act under s. 243(1) of the Act, which was probably why he limited the stay until the disposal of the merits appeal. When these matters were raised during argument, the appellant argued that there were no special circumstances warranting the grant of a stay and, hence, the D judge below erred in making the order that he did. Now, it is well settled that the grant or refusal of a stay pending appeal is a matter within the discretion of the court. The purpose of a stay is to preserve the integrity of an appeal. If the refusal of a stay would render an appeal academic, that fact may E move a court to grant a stay. In the case at hand, although no written reasons were provided by the High Court for its decision, it was clear that a reasonable tribunal seised of the facts set out in the appeal record would have exercised its discretion in the way in which the judge did in this case. F Accordingly, no appellate error was detectable in the decision of the High Court. (paras 8 & 9)

Bahasa Malaysia *Translation Of Headnotes*

Mahkamah Tinggi telah membuat perintah menggulung syarikat G responden atas petisyen yang dikemukakan pempetisyen/perayu. Responden memfail notis rayuan ke mahkamah ini ketika rayuan tersebut ('rayuan atas merit') sedang menunggu keputusan. Dalam pada itu, responden memulakan saman di hadapan hakim dalam kamar memohon penggantungan perintah penggulungan. Saman H menyatakan bahawa permohonan dibuat di bawah s. 243(1) Akta Syarikat 1965 ('Akta') dan/atau bidang kuasa semulajadi. Hakim yang mendengar saman membuat perintah menggantung segala akibat perintah penggulungan sehingga rayuan atas merit diputuskan. Perayu merayu terhadap perintah tersebut sambil I berhujah: (i) bahawa responden tidak mempunyai wibawa untuk

memohon penggantungan; dan (ii) bahawa fakta-fakta di hadapan Mahkamah Tinggi tidak mewajarkan suatu perintah penggantungan di bawah s. 243(1) Akta dibuat.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Hujah perayu bahawa responden tidak mempunyai wibawa perlu ditolak berdasarkan prinsip dan juga autoriti. Berdasarkan prinsip, pokok perkaranya adalah seperti berikut. Jika perayu betul dalam hujahnya, maka tiada apa-apa rayuan boleh dikemukakan oleh sesebuah syarikat yang sedang menghadapi perintah penggulungan, kerana tiada seorangpun yang berkompeten untuk berbuat demikian. Syarikat yang digulung sudah tiada upaya untuk bertindak kecuali melalui penyelesai. Jika beliau memutuskan untuk tidak merayu maka halperkara berakhir di situ dan tiada suatu apa pun boleh dibuat selepasnya. Hujah sebegini telah dibuat di dalam *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* dan ditolak oleh Mahkamah Agong. Dengan itu, isu *locus standi* adalah hujah kosong semata-mata.

(2) Adalah jelas dari perintah yang dibuat yang arif hakim bahawa penggantungan dibenarkan sementara menunggu keputusan rayuan atas merit, yang mana perintah itu bukanlah menyerupai perintah yang dibuat oleh mahkamah di bawah s. 243(1) Akta. Oleh itu, menjadi perhitungan utama yang arif hakim, yang berpengalaman dalam undang-undang syarikat, bahawa adalah tidak terbuka baginya untuk bertindak di bawah s. 243(1) Akta, dan mungkin itulah sebabnya mengapa beliau menghadkan penggantungan kepada penyelesaian rayuan atas merit. Apabila perkara-perkara ini dibangkitkan semasa penghujahan, perayu berhujah bahawa tidak wujud halkeadan istimewa bagi mewajarkan pemberian penggantungan, dan dengan itu, hakim di bawah khilaf apabila membuat perintah yang berkenaan. Harus diingat bahawa pemberian atau penolakan penggantungan sementara menunggu rayuan adalah perkara yang termasuk dalam budibicara mahkamah. Tujuan penggantungan adalah untuk mengekalkan integriti sesuatu rayuan. Jika penolakan penggantungan boleh menyebabkan rayuan menjadi akademik, fakta itu boleh mempengaruhi mahkamah untuk membenarkan penggantungan. Dalam kes

A semasa, walaupun tiada alasan bertulis diberikan oleh Mahkamah Tinggi bagi keputusannya, adalah jelas bahawa sebuah tribunal yang munasabah, yang berhadapan dengan fakta-fakta yang ada seperti di rekod rayuan, akan melaksanakan budibicaranya sama seperti yang dilaksanakan
B oleh yang arif hakim di sini. Keputusan Mahkamah Tinggi, dengan itu, tidak menyerlahkan apa-apa kekhilafan yang boleh dirayui.

Case(s) referred to:
C *Chong Wooi Leong v. Lebbey Sdn Bhd (No 2) [1998] 2 CLJ 509 CA* ***(refd)***
Fitzholmes v. Waryam AIR [1923] Lahore 514 ***(refd)***
Jesasu Pty Limited v. Minister for Mineral Resources [1987] NSWJB 207 ***(refd)***
Re Wickham [1887] 35 Ch D 272 ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1991] 3 CLJ
D *2078; [1991] 1 CLJ (Rep) 436 SC* ***(foll)***
Vijayalakshmi Devi v. Dr Mahadevan [1995] 3 CLJ 493 FC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 243(1)
Courts of Judicature Act 1964, s. 73
E

For the appellant - Shanti Mogan; M/s Shearn Delamore & Co
For the respondent - S Tilaga; M/s Megat Najmuddin, Leong & Co

[Appeal from High Court, Kuala Lumpur; Companies Winding-Up No: D5-
28-618-2005]
F

Reported by Suresh Nathan

JUDGMENT

G

Gopal Sri Ram JCA:

[1] This appeal raises a short but important point of practice and procedure in the sphere of company law. The relevant facts fall
H within a narrow compass. On 30 January 2007, the High Court made an order winding up the respondent company on a petition presented by the appellant. On 16 February 2007 the respondent gave notice of appeal to this court. That appeal – I will refer to it as the "merits appeal" – is presently pending. In the meantime the
I respondent took out a summons returnable before the judge in chambers seeking a stay of the winding up. The summons says that the application is made under s. 243(1) of the Companies Act

1965 ("the Act") and/or the inherent jurisdiction. The summons was supported by the affidavit of Cheah Theam Kheng, a director of the respondent. In it he says that he is authorised to make the affidavit on the respondent's behalf. The learned judge who heard the summons made an order staying the effects of the winding up order until the outcome of the merits appeal. The petitioner was unhappy with this order. It appealed to us. It is this instant appeal. I will refer to it as "the stay appeal". We heard it on 1 August 2007 and dismissed it. Ordinarily in a case such this we will not normally produce a written judgment. But, as I have said, a point of practical importance has arisen and demands written reasons for our decision to provide some guidance to the profession.

[2] The first issue raised in support of the appeal is that the respondent lacked standing to apply for a stay. It had been wound up. It had no board of directors. All management powers vested in the provisional liquidator. Accordingly Cheah Theam Kheng had no business in purporting to act as a director and in affirming the affidavit in support of the summons for a stay. This argument must be rejected both on principle and authority. As for principle, the point is simply this. If the appellant is correct in its argument then no appeal can ever be lodged by a company against which a winding up order is made. Because there is nobody competent to mount the challenge. The company having been wound up ceases to be able to act save through the liquidator. And if he decides not to appeal then that is the end of that. Nothing further can be done.

[3] A similar submission was made in *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436 and rejected by the Supreme Court. Hashim Yeop A Sani CJ (Malaya) said:

> In *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105, it was held, *inter alia*, that notwithstanding the appointment of the provisional liquidator and the general assumption by him of the company's powers, the board still retained certain residuary powers which included authority to instruct solicitors and counsel to oppose the petition and, if a winding-up order is made, to appeal against the order. In that case it was also held that the power to instruct solicitors and counsel is not the power which any one could suggest has passed to the provisional liquidator. At p 1113, Plowman J said:

> The issue is to the extent of those residuary powers, and in particular whether they extend to the launching of the present motion. I think that it may sometimes be helpful to test the matter by considering the other side of the coin, namely to enquire whether the power which the board is said to have lost is one which can be said to have been assumed by the liquidator. If the answer is that it cannot, that may be a good reason for saying that the board still retains it. Clearly, for example, as I have already indicated, the power to instruct solicitors and counsel on the hearing of the winding-up petition is not a power which anyone could suggest has passed to the provisional liquidator and therefore the board retains it. If that is true in regard to the petition itself, it is, in my judgment, equally true of interlocutory proceedings which are such that it would not be appropriate for the provisional liquidator to give instructions on behalf of the company.

Plowman J's decision found support in the Supreme Court of Victoria, Australia (where our Companies Act 1965 came from) in *Brinds Ltd & Ors v. Offshore Oil NL & Ors* [1985] 10 ACLR 242 where in the judgment of that court the following passage appears:

> During the argument, I raised the question whether the applicant, Brinds Ltd, having been in liquidation since December 1983 and throughout apparently insolvent, had any *locus standi* to make, itself, this application for a stay, as distinct from on the one hand, such an application made by or with the consent of the liquidator and, on the other hand, a different application by others under s. 383 of the Code.
>
> Since then, the researches of Nicholson J have discovered that ingenious counsel in 1879 raised the question and put the negative answer to the Court of Appeal in England in *Re Diamond Fuel Co* [1879] 13 Ch D 400 – see especially pp 404-405. Nearly 100 years later, in *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105 at pp 1112–1113, Plowman J suggested what I think are substantial reasons for an affirmative answer and, in any event, I think this court should proceed on the footing that the directors of Brinds Ltd have power to bring the present application in the name of the company. See also *McPherson Company Law* (2nd Ed) p 394 *et seq.*

> *Re Diamond Fuel Company* [1879] 13 Ch D 400 is also authority for the proposition that, despite the fact a liquidator had been appointed, a residual power of appeal remains vested in the directors.

There is therefore nothing in the *locus standi* point.

[4] The next issue has to do with the grounds on which stay should be granted. Here, we do not have the benefit of written reasons from the High Court as to why the learned judge granted the stay. We are therefore disadvantaged in the sense that we do not know his reasons for making the order he did. Learned counsel for the appellant argued that since s. 243(1) of the Act was mentioned in the respondent's summons, the judge must have acted under that section. It was also submitted that the facts put before the High Court did not warrant an order for stay under that section.

[5] This is what s. 243(1) says:

> At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

[6] The section is a rather special provision. It is designed to perpetually stay all proceedings under a winding up for the purpose of resuscitating the subject company. The way in which the section is to be applied has been fairly worked out in the leading cases on the subject. These were all discussed by the Federal Court in *Vijayalakshmi Devi v. Dr Mahadevan* [1995] 3 CLJ 493. This is what the court said in that case:

> The principles which govern the court in the exercise of its jurisdiction whether to grant or refuse a stay have been established in the following cases. In the leading case of *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174, Buckley J was dealing with an application under s 89 of the English Companies Act 1862, which is similar to our s 243, which provided that the court may at any time after a winding-up order, upon the application of any creditors or contributory and 'upon proof to the satisfaction of the court that all proceedings in relation to such winding-up ought to be stayed', make an order staying the same.

What then should be the material considerations to induce the court to order a stay? According to Buckley J (taken from the headnote which summarized the text of his decision) [1903] 2 Ch 174 at p 174:

> In the exercise of its jurisdiction with reference to staying proceedings under an order for the winding-up of a company, the court should, so far as possible, act upon the principles which are applicable in exercising jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy against an individual – in which cases the court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether the rescission or annulment will be conducive or detrimental to commercial morality and to the interests of the public at large.
>
> In refusing or postponing a stay of winding-up proceedings the court will have regard to the following facts:
>
> (a) That directors have not complied with their statutory duties as to giving information to the Official Receiver or furnishing a statement as to the affairs of the company.
>
> (b) That there has been an undisclosed agreement between the promoter and the vendor to the company as to the participation by the former in fully paid shares forming the consideration for the purchase of property by the company on its formation.
>
> (c) That the promoter has made gifts of fully paid shares to the directors.
>
> (d) That there are any other matters connected with the promotion, formation, or failure of the company, or the conduct of its business or affairs, which appear to the court to require investigation.

We pause here to state that we respectfully accept the above principles laid down by Buckley J and would apply them in dealing with the present appeal.

In *Krextile Holdings Pty Ltd v. Widdows*, Gillard J of the Supreme Court of Victoria held [1974] VR 689 at p 694:

> It is not merely necessary for the applicant to establish that a stay is reasonable in the circumstances. He must satisfy the court it ought to grant a stay. As was emphasized by Buckley J in *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174 at p 182:

> I decline to order a stay of these proceedings until it is proved to my satisfaction that the winding up ought to be stayed. That will not be proved to my satisfaction until it is shown to me that all the facts are as I hope they are – that the trading operations of this company have been fair and above-board.

The above principles have been summarized by the learned editors of 1 *Palmer's Company Law* (24th Ed) para 88-28 at p 1390 as follows:

> In exercising this discretion the court will be guided by the analogy of the former practice in bankruptcy in rescinding a receiving order – that is to say, it will consider the interests of commercial morality and not merely the wishes of creditors, and will refuse a stay if there is evidence of misfeasance or of irregularities demanding investigation.

In *Re Calgary & Edmonton Land Co Ltd*, it was held that the jurisdiction of the court was discretionary and that it was for those who sought a stay to make out a sufficient case. Megarry J also dealt with the persons whose interests the court had to consider on an application for a stay. In his judgment ([1975] 1 All ER 1046 at p 1051; [1975] 1 WLR 355 at p 360), his Lordship stated:

> These must, of course, depend on the circumstances of each case; but where, as here, there is a strong probability, if not more, that the assets of the company will suffice to pay all the creditors and the expenses of the liquidation, and so leave a surplus for the members of the company, there are plainly three categories to consider. First, there are the creditors. … Second, there is the liquidator. … Third, there are the members of the company. No question of satisfying them by immediate payment of all that they are entitled to can very well arise; for unlike the creditors, with their ascertained or ascertainable debts, the rights of the members cannot be quantified until the liquidation is complete. Accordingly, in normal circumstances I think that no stay should be granted unless each member either consents to it, or is otherwise bound not to object to it, or else there is secured to him the right to receive all that he would have received had the winding up proceeded to its conclusion. Each member has a right of a proprietary nature to share in the surplus assets, and each should be protected against the destruction of that right without good cause.

A It will be observed that each of the heads is qualified by the words "in normal circumstances". I am not suggesting that in these cases there are hard and fast rules; but I am saying that the circumstances that I have mentioned will usually be at least highly material in deciding how the
B court's discretion should be exercised.'

In summary, the principles which emerge from the above authorities are these:

(1) The granting of a stay under s. 243 of the Act is
C discretionary and the onus is on the party seeking a stay to make out a positive or sufficient case.

(2) The attitude of the creditors, contributories and the liquidator is a relevant consideration.

D (3) That in exercising its discretion, the court will consider not only the interest of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large.

(4) Last, and which by no means least, is that a stay will
E be refused if there is evidence of misfeasance or of irregularities demanding investigation.

It must, however, be remembered that the above considerations are not meant to be exhaustive …

F **[7]** As may be seen from the authorities discussed in *Vijayalakshmi Devi v. Dr Mahadevan*, s. 243(1) has nothing whatsoever to do with staying the effects of a winding up order pending an appeal challenging the making of that order. The latter is governed by s. 73 of the Courts of Judicature Act 1964. There
G is also inherent jurisdiction in a High Court to stay the effects of its orders pending appeal. See, *Re Wickham* [1887] 35 Ch D 272; *Fitzholmes v. Waryam* AIR [1923] Lahore 514. Indeed, it is a logical step in the appellate process that if a party has a right of appeal conferred upon it then it has the right to seek and obtain
H a stay of the order appealed against: The remarks of the Supreme Court in *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* certainly lend support for that view. Further, in *Chong Wooi Leong v. Lebbey Sdn Bhd (No. 2)* [1998] 2 CLJ 509, Abu Mansor JCA (later FCJ) considered it to be "trite law that a court which has
I given judgment certainly has the power to order stay."

[8] Now, it is clear from the order made by the learned judge that he granted a stay pending the disposal of the merits appeal. That is not the kind of order a court makes under s. 243(1) of the Act. So, it was obviously uppermost in the mind of the learned judge who is experienced in company law that it was not open for him to act under s. 243(1) and that is probably why he limited the stay until the disposal of the merits appeal.

[9] When these matters were raised during argument, learned counsel for the appellant argued that there were no special circumstances warranting the grant of a stay and hence the judge below erred in making the order he did. Now, it is well settled that the grant or refusal of a stay pending appeal is a matter within the discretion of the court. The purpose of a stay is to preserve the integrity of an appeal. See, *Jesasu Pty Limited v. Minister for Mineral Resources* [1987] NSWJB 207. If the refusal of a stay would render an appeal academic, that fact may move a court to grant a stay. In the case at hand, although no written reasons were provided by the High Court for its decision, it is clear that a reasonable tribunal seised of the facts set out in the appeal record would have exercised its discretion in the way in which the judge did in this case. Accordingly, no appellate error is detectable in the decision of the High Court.

[10] It calls for reiteration that the usual tests for appellate error are inapplicable here because of the want of written reasons. For, it is unrealistic to speak of a judge not having misdirected himself on the facts or the law when there is absent a written judgment explaining why a particular order was made. When no reasons are given, we simply do not know why discretion was exercised in the way in which it was. Hence the only question that remains to be asked is this. Would a reasonable tribunal armed with the relevant facts have exercised discretion in the way in which it has been exercised in the particular case? That question, as I have already said, must receive an affirmative answer on the facts of this case.

[11] For the reasons given, the appeal was dismissed and those orders usually consequent upon a dismissal made.

[12] My learned brothers James Foong Cheng Yuen and Suriyadi bin Halim Omar, JJCA have seen this judgment in draft and have expressed their agreement with it.